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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RODERICK MICHAEL MACNEIL,

Defendant and Appellant.

B216399

(Los Angeles County
Super. Ct. No. A194048)

APPEAL from an order of the Superior Court of Los Angeles County,
James R. Brandlin, Judge. Affirmed.

Paul Bernstein, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan
Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and
Respondent.

Roderick Michael MacNeil was found not guilty of murder by reason of insanity. He appeals from the post-judgment order denying his application for release from Patton State Hospital (Patton) into outpatient treatment under Penal Code section 1026.2.¹ He contends the order must be reversed because the evidence was insufficient that he was suffering from a mental disease or disorder, making him a danger to the safety of others while under treatment. We conclude the court did not abuse its discretion and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 1978, Roderick Michael MacNeil bludgeoned to death a 16-year-old girl. MacNeil, who was 17 years old at the time of the killing, was tried as an adult (Welf. & Inst. Code, § 707, subd. (d)). He entered dual pleas of guilty and not guilty by reason of insanity to the crime of first degree murder (§ 1026, subd. (a)). Following his conviction in 1979, MacNeil was ordered committed to Patton for a maximum life term of confinement. MacNeil's primary diagnosis was antisocial personality disorder (APD).

In 1997, MacNeil made multiple threats against his roommate and the staff at Patton, and engaged in physical altercations. He was transferred to Corcoran State Prison for unmanageable behavior (Welf. & Inst. Code, § 7301) until 2000, when he was ordered returned to Patton.

In 2002, MacNeil successfully applied for release into outpatient treatment under the Conditional Release Program (CONREP). In 2004, his outpatient status was revoked for violating CONREP rules, failing to timely disclose the violations and for assaulting CONREP staff and destroying property. MacNeil was recommitted to Patton.

In 2007, MacNeil told treating physicians at Patton he had never suffered from APD or any other mental disorder or disease. According to MacNeil, he had lied 30 years earlier about experiencing certain symptoms of mental illness, because he did not

¹ Statutory references are to the Penal Code, unless otherwise designated.

want to be committed to state prison. MacNeil applied for release into outpatient treatment under section 1026.2, and the trial court set a hearing date.

At the July 2008 hearing under review, the defense presented the testimony of Drs. Mubashir Farooqi, Emad Aziz, and George Proctor, Patton staff psychiatrists, who successively treated MacNeil. MacNeil elected not to testify. Two CONREP psychologists and a Patton correctional officer testified for the prosecution. The psychiatrists and psychologists also relied upon written reports, which are part of the appellate record.

1. Summary of Hearing Testimony

The physician witnesses all agreed MacNeil had been diagnosed from 1979 until 2007 as suffering from APD which is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood (before the age of 15 years) and continues into adulthood. They also agreed that a valid diagnosis of APD includes a documented childhood history of violence or assaultive behavior, deceitfulness and manipulation, lack of remorse, substance abuse, recklessness and impulsivity. The witnesses further agreed that, as an adult, MacNeil suffered from substance abuse, but was currently in remission, and that he had engaged in several instances of impulsive and assaultive behavior both at Patton and at CONREP. The witnesses disagreed, however, as to whether the reported symptoms ascribed to MacNeil during childhood supported his existing diagnosis of APD.

a. Summary of defense evidence

Dr. Mubashir Farooqi testified while treating MacNeil in 2007, MacNeil insisted he was misdiagnosed as having APD. Farooqi agreed to conduct a psychological assessment that would confirm or reject this diagnosis. To that end, Farooqi interviewed MacNeil's family about his childhood, requested a forensic consultation and additional testing. However, MacNeil left the unit before Farooqi could complete his assessment.

It was Farooqi's opinion that MacNeil's current records did not support a definitive diagnosis of APD. Farooqi considered the symptoms MacNeil reportedly

suffered during childhood as too conclusory to be clinically meaningful. Nor were these symptoms adequately substantiated. Farooqi also believed MacNeil's school and hospitalization records were incomplete. As a result, Farooqi could not make "a final diagnosis" of APD. After discounting MacNeil's reported childhood symptoms, Farooqi diagnosed MacNeil as suffering from adult antisocial behavior which, unlike APD, is not a mental disease or disorder. Had Farooqi been able to complete his assessment, including a review of MacNeil's missing records, his diagnosis might have been different.

Dr. Aziz treated MacNeil at Patton in 2008 and testified he could not diagnose MacNeil as having APD during the few months of treatment. However, Aziz found MacNeil's adult history of assaultive behavior, defying unit rules and ouster from CONREP to be very significant. Nonetheless, Aziz opined MacNeil was not currently suffering from a mental disorder or illness, although Aziz acknowledged having signed a report dated May 14, 2008, which diagnosed MacNeil as having APD. Aziz testified he no longer agreed with the report because it failed to indicate that MacNeil had exhibited the characteristic symptoms of APD during childhood. Aziz testified he also had requested an additional assessment to clear up the apparent confusion as to MacNeil's existing diagnosis. According to Aziz, MacNeil had been previously diagnosed as suffering from disorders other than APD.

Dr. George Proctor began treating MacNeil at Patton in December 2008. He decided to review MacNeil's records and to interview both MacNeil and his former treating physicians to resolve the question of MacNeil's existing diagnosis. It was Proctor's conclusion that MacNeil currently suffered from substance abuse and adult antisocial behavior, neither of which is a mental disorder. Proctor testified to having rejected the diagnosis of APD, in part because he considered as unreliable the reports of MacNeil's disruptive and violent childhood behavior. Proctor understood that MacNeil was the primary source of these reports, having made them shortly after the murder, when, as MacNeil later admitted, he was attempting to feign mental illness to avoid a

prison commitment. On cross-examination, Proctor acknowledged MacNeil's episodes of violent behavior at Patton were consistent with "the adult component" of APD.

b. Summary of People's evidence

Dr. Daniel Sussman was currently the CONREP Community Program Director and a clinical psychologist. Sussman testified as a former clinical director of CONREP, he determined whether mentally ill criminal offenders were amenable to outpatient treatment. Among these patients was MacNeil, whom Sussman monitored and assessed in 1999 and again from 2002 to 2004. Sussman testified to various episodes when MacNeil displayed verbal and physical violence against staff and patients while at Patton and at CONREP.

Dr. Sussman declined to render an opinion as to MacNeil's current amenability to outpatient treatment, explaining he had not reviewed MacNeil's records since 2004. However, Sussman opined MacNeil suffered from APD. He testified to a report prepared by Dr. Ashley King Berman of her evaluation of MacNeil in 2003, which diagnosed him as having APD. Among the indicators Berman relied upon in making her diagnosis were instances of MacNeil's combative and destructive behavior before the age of 15 years, including his fighting with peers and adults, vandalism, physically disrupting class, and truancy. Sussman testified two of the most defining characteristics of the disorder in Berman's report were MacNeil's lack of remorse for his bad behavior and his ability to deceive others.

As the Chief Forensic Psychologist for CONREP Orange County, Stacey Berardino was charged with assessing whether mentally ill criminal offenders were amenable to outpatient treatment. Berardino testified that since May 2004 (when MacNeil assaulted a CONREP Los Angeles staff member), either she or another CONREP Orange County staff member had been monitoring MacNeil's behavior. Berardino testified after reviewing MacNeil's medical records and his performance on a 2005 psychopathology test, she determined he was still a threat to the health and safety of others due to his mental condition.

Dr. Berardino characterized MacNeil as a psychopath, a personality-type of component, which is closest to APD as a mental disorder. Berardino's opinion MacNeil currently suffered from APD was based on MacNeil's past and present behavior, particularly his pattern of violence. Berardino noted MacNeil's most recent assault was in August 2008, when he attempted to disarm a Patton correctional officer. Berardino then testified to various documented episodes of MacNeil's assaultive and disruptive behavior during childhood as symptomatic of APD, including fighting with peers, assaulting teachers, truancy, early drug and alcohol abuse, and destruction of property. Berardino testified she had interviewed MacNeil in the past, and she attempted to interview MacNeil before testifying at the hearing. However, MacNeil refused Berardino's latest request for an interview.

Alba Knierim was a Patton correctional officer on August 27, 2008. She testified MacNeil threatened to kill her with her gun after he argued with a female patient. Knierim grabbed MacNeil by the shoulders and forced him to the ground. MacNeil continued his threats while trying to grab her gun. As a result of this incident, MacNeil pleaded guilty to disturbing the peace in December 2008.

2. Trial Court's Findings and Order

In denying the application, the trial court found MacNeil had failed to carry his burden of proof. The court determined MacNeil remains a danger to others due to a mental disorder or disease and transferring him into outpatient treatment would be inappropriate.

DISCUSSION

When a person has been found not guilty by reason of insanity and committed to a state hospital, he or she may apply to the superior court for release from commitment "upon the ground that sanity has been restored." (§ 1026.2, subd. (a).) "If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to a mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic

conditional release program for one year.” (§ 1026.2, subd. (e).)² “[T]he applicant shall have the burden of proof by a preponderance of the evidence.” (§ 1026.2, subd. (k); see *People v. Sword* (1994) 29 Cal.App.4th 614, 624; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1433.)

The trial court’s decision to deny outpatient status is reviewed on appeal for abuse of discretion. (*People v. Cross* (2005) 127 Cal.App.4th 63, 73.) “Under that standard, it is not sufficient to show facts affording an opportunity for a difference of opinion. [Citation.]” (*Ibid.*) Instead, “discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.” (*Ibid.*)

In challenging the trial court’s finding he failed to meet his burden of proof, MacNeil does not dispute he posed a danger to others if he were released into outpatient treatment. Instead, MacNeil argues the court abused its discretion by ignoring the unanimous testimony of his treating psychiatrists that he did not have an existing mental disorder or disease, and by relying instead on the opinions of prosecution witnesses, which were entirely without factual support. He also argues the prosecution’s expert witnesses based their opinions on inadmissible hearsay.

The question of whether an individual suffers from a mental disease, disorder or defect that renders him or her a danger to others is not a question of law, but one of fact to be resolved with the assistance of expert testimony. (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 213.) Expert testimony is a substantial factor to be considered in assessing the sufficiency of the evidence. By itself, it provides a sufficient basis for the trial court’s conclusion. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467.)

At the conclusion of the hearing, the parties agreed during argument the issue of whether MacNeil was currently suffering from APD turned on the reliability and

² At the conclusion of the one-year period, the court “shall have a trial to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to a mental defect, disease, or disorder.” (§ 1026.2, subd. (e).)

adequacy of MacNeil's reported childhood symptoms and the conflicting opinions in that regard of the two sets of expert witnesses. The trial court found the testimony of the prosecution expert witnesses to be more persuasive. This is not surprising in light of the defense expert witnesses' acknowledgment they were basing their diagnosis solely on MacNeil's adult behavior, and did not reject without reservation or the need for confirmation the possibility he was suffering from APD. In any event, by pointing to what he now perceives as insufficient factual bases for the opinions of Drs. Sussman and Berardino, MacNeil is inviting us to reweigh the evidence which is not the function of an appellate court. (*People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Culver* (1973) 10 Cal.3d 542, 548.)

As for MacNeil's complaint the prosecution expert witnesses relied on inadmissible hearsay evidence in rendering their opinions, he failed to interpose an appropriate objection during the hearing. Accordingly, the issue is therefore forfeited or waived.³ (Evid. Code, § 353, subd. (a); see *People v. Bolin* (1998) 18 Cal.4th 297, 321, *People v. Nwator* (1996) 46 Cal.App.4th 39, 47.) However, such an objection would have been overruled. Expert witnesses may base their testimony on material not admitted into evidence if is of the type that is reasonably relied upon by experts in their field. (Evid. Code, § 801, subd. (b); see *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) As in this case, mental health experts routinely rely on interview reports and observations of nontestifying experts. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747, citing *People v. Campos* (1995) 32 Cal.App.4th 304, 307, see *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569 [an expert may rely upon inadmissible evidence to render an opinion on the criteria necessary for MDO commitment].) There was no evidentiary error.

³ MacNeil is not contending the hearsay evidence was "testimonial" and that he was thus deprived of his Sixth Amendment right to confrontation as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].

In sum, the trial court's findings are supported by substantial evidence; the trial court did not abuse its discretion in denying MacNeil's application to be released into outpatient treatment.

DISPOSITION

The order under review is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.